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In the Supreme Court of the United States

OCTOBER TERM, 1979

EARTH SATELLITE CORPORATION AND CONTINENTAL CASUALTY COMPANY, PETITIONERS

v.

ROBERT HASTINGS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

WADE H. McCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

GILBERT T. RENAUT
KERRY L. ADAMS
Attorneys
Department of Labor
Washington, D.C. 20210

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QUESTIONS PRESENTED

1. Whether the pre-1972 limit on aggregate compensation benefits for certain disabilities under former Section 14(m) of the Longshoremen's and Harbor Workers' Compensation Act applies to cases where that limit had not been reached at the time of its repeal.

2. Whether an injured worker's "average weekly wage" under Section 10 of the Longshoremen's and Harbor Workers' Compensation Act should be measured by the amount he earned during the period immediately preceding the injury, where the worker had demonstrated a progressive increase in earnings while recuperating from an earlier injury.

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*The Director of the Office of Workers' Compensation Programs of the Department of Labor is also a respondent.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-27a) is not yet reported. The opinion of the Benefits Review Board (Pet. App. 28a-37a) is reported at 8 B.R.B.S. 519. The opinion of the administrative law judge (Pet. App. 38a-61a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on March 19, 1980. The petition for a writ of certiorari was filed on June 17, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondent Robert Hastings is permanently totally disabled as a result of injuries sustained in the course of his employment with petitioner Earth Satellite Corporation (Pet. App. 2a-3a, 4a n.3). On April 1, 1971, Hastings suffered an employment-related stroke (*id.* at 2a-3a). On February 8, 1972, following a ten-month convalescence, Hastings returned to work part-time at Earth Satellite. He was compensated at his former salary rate but his earnings were reduced in proportion to his diminished hours (*ibid.*). Hastings worked part-time for about two years until March 14, 1974, when employment-related pulmonary emboli rendered him unable to work (*id.* at 3a-4a).

Thereafter, Hastings filed compensation claims for the stroke and the emboli under the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*), as extended to employment in the District of Columbia by the District of Columbia Workmen's Compensation Act (D.C. Code Ann. §§ 36-501 and 36-502 (1973); Pet. App. 4a). A Department of Labor administrative law judge found that Hastings was temporarily totally disabled during the ten-month period

of convalescence following his stroke, permanently partially disabled during the two-year period of part-time employment, and permanently totally disabled after March 14, 1974 (*id.* at 5a-6a, 55a). For both the ten-month and the two-year periods of disability attributable to the stroke, the administrative law judge awarded Hastings benefits of $70.00 per week, the maximum rate of compensation prior to the 1972 Amendments to the Longshoremen's Act (*id.* at 5a-6a, 60a).[2] For the permanent total disability resulting from the emboli, Hastings was awarded two-thirds of his "average weekly wages" (*id.* at 6a, 56a).[3] Concluding that "[p]robably the best way to determine the average weekly wage of a part-time worker such as the claimant is to take one fifty-second part of his actual average annual wage of $9228.80 for the year prior to his injury of March 14, 1974 * * *" (*id.* at 56a), the administrative law judge fixed Hastings'

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[2]The Longshoremen's Act provides for compensation equivalent to two-thirds of lost earning capacity (Sections 8(a), 8(b), 8(c)(21) and 8(e), 33 U.S.C. 908(a), 908(b), 908(c)(21) and 908(e)), not to exceed a specified maximum rate (Section 6(b), 33 U.S.C. 906(b)). The Longshoremen's and Harbor Workers' Compensation Act Amendments of 1972 (Pub. L. No. 92-576, Section 5(a), 86 Stat. 1252-1253) raised the maximum rate of compensation by phasing in a formula based on a percentage of the "national average weekly wage." Under the adjustment scheme set out in amended Section 10(h) of the Act, 33 U.S.C. 910(h), Hastings' disability from the 1971 injury remains subject to the pre-1972 $70.00 per week limit. See *Landrum* v. *Air America, Inc.*, 534 F. 2d 67 (5th Cir. 1976).

[3]See note 2, *supra*. The Section 6(b) maximum rate then in effect was $261 per week. See *Director, OWCP* v. *Rasmussen*, 440 U.S. 29, 34 n.5 (1979). Hastings was entitled to the full two-thirds of average weekly wage provided for by Section 8(a) since that amount did not exceed this maximum rate.

permanent total disability benefits at $118.32 per week, commencing March 14, 1974 (*id.* at 6a-7a, 21a, 60a).[4]

On appeal, the Benefits Review Board modified the award, extending the benefits for permanent partial disability to run concurrently with the benefits for permanent total disability until they reached the $24,000 limit set by former Section 14(m) of the Act, 33 U.S.C. (1970 ed.) 914(m), which had been repealed by Section 5(e) of the LHWCA Amendments of 1972, Pub. L. No. 92-576, 86 Stat. 1254. (Pet. App. 9a, 36a).

The court of appeals agreed that the permanent partial disability benefits should continue concurrently with the permanent total benefits (Pet. App. 13a-15a).[5] However, the court ruled that the claimant's benefits for the stroke-caused disability were not limited by the pre-1972 $24,000 ceiling. Applying this Court's guidelines in *Bradley* v. *Richmond School Board*, 416 U.S. 696 (1974), the court below ruled that "the repeal of section 14(m) applies retroactively to awards for preamendment injuries that had not reached the statutory ceiling before the effective date of the 1972 Amendments" (Pet. App. 20a). As for the computation of Hastings' average weekly wage at the time of his second injury, the court of appeals concluded that the administrative law judge's "mechanical application" of the Act's earning capacity formula failed to take into account the gradual increase in the number of hours Hastings had worked in the year preceding the injury (*id.* at 3a n.2, 21a-25a). The court therefore remanded for a

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[4]Under Section 8(f) of the Longshoremen's Act, 33 U.S.C. 908(f), Earth Satellite's liability was limited to the first 104 weeks of permanent total disability benefits; the balance would be paid from the "special fund" established by Section 44 of the Act, 33 U.S.C. 944 (Pet. App. 8a & n.11).

[5]This scheme of concurrent awards is not challenged here.

new calculation of average weekly wages, concluding that "where * * * an employee demonstrates a progressive increase (or decrease) in earnings in the year immediately preceding an injury, * * * a compensation award should be fixed by * * * examining most closely the earnings immediately preceding the injury" (*id.* at 25a).

ARGUMENT

1. In holding that disability claims pending at the time of Section 14(m)'s repeal should not be limited by that Section's $24,000 ceiling, the court of appeals correctly followed the principle, enunciated in *Bradley* v. *Richmond School Board*, 416 U.S. 696, 711 (1974), that "a court is to apply the law in effect at the time it renders its decision, unless doing so would result in manifest injustice or there is statutory direction or legislative history to the contrary." Accord, *Cort* v. *Ash*, 422 U.S. 66, 76-77 (1975).[6]

Although the express language of the 1972 LHWCA Amendments does not indicate whether the repeal of Section 14(m) applies to continuing disability cases, an affirmative answer is implicit in language Congress elected not to employ. As the court below noted (Pet. App. 16a-17a & n.15), unlike the 1972 modification all previous changes in Section 14(m)'s benefit levels were expressly limited in their application to deaths and injuries occurring after enactment. Act of June 24, 1948, ch. 623, Section 6, 62 Stat. 604; Act of July 26, 1956, ch. 735,

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[6]Petitioners incorrectly assert (Pet. 12-14) that the *Bradley* principle had not been established at the time the 1972 LHWCA Amendments were enacted. The *Bradley* court expressly rested its decision on an earlier decision (*Thorpe* v. *Housing Authority*, 393 U.S. 268 (1969)) that settled the law on this point and "stands for the proposition that even where the intervening law does not explicitly recite that it is to be applied to pending cases, it is to be given recognition and effect." 416 U.S. at 715.

Section 9, 70 Stat. 656; Act of July 14, 1961, Pub. L. No. 87-87, Section 4, 75 Stat. 204. Thus, "[t]he 1972 Congress, by its silence, deviated from the past practice of specifically providing for nonretroactivity" (Pet. App. 17a).

That this deviation was purposeful is borne out by the circumstances surrounding it. During hearings on the 1972 Amendments, a prominent industry spokesman urged both houses to adopt, as they had in the past, a provision limiting the amendments' reach to future injuries. See *Hearings on S. 2318, S. 525, and S. 1547 Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 314 (1972); *Hearings on H.R. 247, H.R. 3505, H.R. 12006, and H.R. 15023 Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 115, 131-132 (1972) (statements of E.D. Vickery). The 1972 Amendments as finally passed did contain an express limitation "to deaths or injuries occurring after the enactment of this Act" (Section 20(c)(3) of the Amendments, 86 Stat. 1265), but only with respect to a subsection (Section 20(c)) that eliminated the requirement that a widower prove dependency on his spouse in order to collect death benefits. The subsection repealing Section 14(m) (Section 5(e) of the Amendments, 86 Stat. 1254) does not contain a comparable limitation. This legislative history strongly suggests that Congress intentionally chose to treat the repeal of Section 14(m)'s $24,000 ceiling differently than it had treated prior changes and to make the repeal applicable to pending disability claims. In any event, there certainly is nothing in the language, structure or legislative history of the Amendments to imply, much less compel, a contrary conclusion.

Moreover, the court of appeals correctly concluded that applying the repeal of Section 14(m) to pending cases

would not work a manifest injustice. Looking to the factors set forth in *Bradley* (416 U.S. at 717)—the nature of the parties, the nature of the rights, and the nature of the impact of the change in law upon those rights—the court of appeals observed that the repeal of Section 14(m) constituted a change in remedy rather than a change in basic liability. The "artificial ceiling" of $24,000 had "in effect allowed the employer to avoid the responsibility for the full costs associated with his enterprise because it deprived his employees of compensation for earning capacity lost in the employer's service" (Pet. App. 19a). Thus, the amendment merely removed an "obstacle to fair treatment" (*id.* at 20a). Contrary to petitioners' contention (Pet. 20, 24), the amendment did not impair matured or vested rights since neither a claimant's right to benefits nor an employer's liability for them fully matures under the Longshoremen's Act until one year after the rejection of a claim or the last payment of compensation. Section 22 of the Act, 33 U.S.C. 922. See *Banks* v. *Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 461-465 (1968); *O'Keeffe* v. *Aerojet-General Shipyards, Inc.*, 404 U.S. 254 (1971).

The conclusion that the decision below does not result in manifest injustice is reinforced by the fact that the courts of appeals have consistently applied other liberalizing provisions of the 1972 Amendments without regard to the date of injury. See, *e.g.*, *Matthews* v. *Walter*, 512 F. 2d 941, 946 (D.C. Cir. 1975) (transfer of liability for successful claimants' attorney's fees from claimants to employers); *Dillingham Corp.* v. *Massey*, 505 F. 2d 1126, 1129 (9th Cir. 1974) (same); *Overseas African Construction Corp.* v. *McMullen*, 500 F. 2d 1291, 1297-1298 (2d Cir. 1974) (same); *Cooper Stevedoring of Louisiana, Inc.* v. *Washington*, 556 F. 2d 268, 271-273 (5th Cir. 1977) (liberalized time-limitation provisions); *C & P Telephone Co.* v. *Director, OWCP*, 564 F. 2d 503, 510 (D.C. Cir.

1979) (expanded "second-injury" provision); *Todd Shipyards Corp.* v. *Witthuhn*, 596 F. 2d 899, 901-904 (9th Cir. 1979) (unrelated death benefits); *St. Louis Shipbuilding & Steel Co.* v. *Casteel*, 583 F. 2d 876, 877-878 (8th Cir. 1978) (same); *Nacirema Operating Co.* v. *Lynn*, 577 F. 2d 852 (3d Cir. 1978), cert. denied, 439 U.S. 1069 (1979) (same); *State Insurance Fund* v. *Pesce*, 548 F. 2d 1112 (2d Cir. 1977) (same); *Norfolk, Baltimore & Carolina Lines, Inc.* v. *Director, OWCP*, 539 F. 2d 378 (4th Cir. 1976), cert. denied, 429 U.S. 1078 (1977) (same).[7]

2. The court of appeals' reversal of the administrative calculation of Hastings' "average weekly wage" preceding his second injury was justified under the facts of this case. While recognizing that earning capacity is a factual determination with respect to which the administrative law judge has broad discretion, the court below observed that that discretion must be exercised with flexibility so as to accomplish the statutory purpose. "Concededly," the court noted, "the ALJ and the Board calculated Hastings' benefits in accord with the literal terms of the statutory formula, [33 U.S.C.] 910(a), 910(d), and we are loath to

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[7]Petitioners' reliance (Pet. 24-32) on the Contract Clause of the Constitution (Article I, Section 10) is misplaced. First, the state court cases cited by petitioners are inapposite. They apply a "contract theory" to elective workers' compensation laws—an increasingly endangered species of laws under which employers may reject a compensation scheme in favor of a more traditional fault-based system. See generally 2A A. Larson, *The Law of Workmen's Compensation* § 67.10 n.62 (1976 & Cum. Supp. 1979). The Longshoremen's Act, like most extant compensation laws, creates a mandatory compensation system. Second, the Contract Clause by its own terms does not cover federal enactments. Of course, the Due Process Clause imposes similar requirements of basic fairness and reasonableness (see, *e.g.*, *Duke Power Co.* v. *Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 82-84 (1978); *Usery* v. *Turner Elkhorn Mining Co.*, 428 U.S. 1, 15-16 (1976)), which are subsumed under the *Bradley* "manifest injustice" test.

criticize an administrative agency for that. The statute does not, however, elevate mechanical computation above common sense. An ALJ can, and should, adjust the average weekly wage calculation to award benefits that accurately reflect the claimant's true earning capacity. The existence of this kind of flexibility is apparent both from the statute itself, and decisions construing it. * * * [33 U.S.C. 910(c)] explicitly recognizes that the mechanical formula for benefit computation must be disregarded where the formula would distort a claimant's actual earning capacity" (Pet. App. 22a).

Nothing in the administrative law judge's one-sentence explanation of his computation suggests that he gave any thought to the pattern of Hastings' earnings following his stroke or took account of Hastings' steady increase in earnings in determining "such sum as * * * shall reasonably represent the annual earning capacity of the injured employee" at the time of the injury. Section 10(c) of the Act, 33 U.S.C. 910(c). As the court below concluded (Pet. App. 23a), Hasting's earning capacity or " 'potential to earn' at the time of his final collapse is not well measured by his earnings as much as 12 months earlier." Accordingly, the court of appeals remanded to the factfinder for a closer examination of Hastings' most recent earnings record. That step does not warrant this Court's review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

WADE H. MCCREE, JR.
Solicitor General

CARIN ANN CLAUSS
Solicitor of Labor

LAURIE M. STREETER
Associate Solicitor

LOIS G. WILLIAMS
Deputy Associate Solicitor

GILBERT T. RENAUT
KERRY L. ADAMS
Attorneys
Department of Labor

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